

Summary

This updated Statement of Appeal by ANC 6B incorporates a revised building permit (B2109853) and certificate of occupancy (CO2102980) related to the appeal of the original permit (B2103902) which was timely filed. The updated statement revises and clarifies the allegations of errors based on the determinations made in the revised permit and certificate of occupancy. Some of the original allegations are moot due to the revisions, but others remain. The new allegations of errors by the Zoning Administrator relate to parking and loading deficiencies, incorrect interpretations of existing nonconformities, factual impossibilities on the altered certificate of occupancy, and a misclassification of use on the altered certificate of occupancy. The timeliness of each allegation is noted below.

Background

This updated Statement of Appeal (“Updated Statement”) is filed by Advisory Neighborhood Commission 6B (“ANC 6B”). This statement supersedes the statement in Exhibit 23. This revised appeal is of Building Permit B2109853 (“First Revised Permit”, Tab A), issued on August 9, 2021, building permit B2103902 (“Original Permit”, Exhibit 3), issued on May 5, 2021, and Certificate of Occupancy CO2102980, issued on August 23, 2021, and the decisions made therein by the Department of Consumer and Regulatory Agency’s (“DCRA”) Zoning Administrator (“ZA”). ANC timely filed an appeal of the Original Permit on June 30, 2021 including an Original Statement of Appeal (“Original Statement”) available at Exhibit 23. The Original Permit (Exhibit 3) was captioned as “Interior renovation of commercial tenant within the existing structure” for the property at 1323 E Street SE, located in ANC 6B, the Affected ANC by the issuance of the building permit. The building code use is unchanged as Mercantile use, but the underlying zoning use is alleged to be unchanged as retail. The First Revised Permit is captioned as “Modification of permit B2103902 Updated site plan, removal of bollards, parking and loading calculations and documentation of prior conditions”.

A certificate of occupancy (“Unrevised First CoFO”) was issued to Lessee on August 23, was originally captioned as “STORAGE WAREHOUSE - DOOR DASH” when issued (Tab B). At some point between then and DCRA’s filing in Exhibit 42, DCRA alerted the certificate of occupancy and approved the use for “RETAIL-PREPACKAGED FOOD AND BEVERAGES ONLY” and updated the caption to include permits not even filed yet when the CoFO was issued (“Altered First CoFO”, Tab C)

ANC 6B is aware DCRA issued permit B2112156 on September 14, 2021 as a revision to the underlying permit (“Second Revised Permit”). The day before this Updated Statement was filed and 9 days after the Second Revised Permit was issued, DCRA finally provided ANC 6B with the permit documents. ANC 6B expects to file another motion to amend this appeal and an updated Statement of Appeal as soon as these documents can be reviewed.

The owner of the Property is E Street Phonix LLC (“Property Owner”)¹. The lessee of the property is DoorDash (“Lessee”).

Permit Timeline

¹ The Property Owner is identified as E Street Phoenix by the Office of Tax and Revenue and in DCRA’s Corporate Filings. However, the ZA and DCRA’s Permit Office continues to reference these permits under E Street Phonix. Nonetheless, John Weintraub has been identified as the managing partner regardless of the spelling and there appears to only be one entity related to this property.

May 5: DCRA issues Original Permit (Exhibit #3). Within this permit, the Zoning Administrator determines that the property is required to provide one loading berth and three parking spaces. ZA further determines that the property owner is providing one loading berth and four parking spaces.

May 21: ANC 6B meets with DoorDash on site to discuss loading and parking issues, first notifying DoorDash of the deficiencies in the loading and parking.

May 24: ANC 6B first notifies the ZA's office of errors in his determinations related to the Original Permit.

June 29: ANC 6B timely files Original Statement (Exhibit #23) appealing the Original Permit alleging, inter alia, that the property cannot provide a zoning compliant loading berth or parking spaces that meet the size requirements set forth in Subtitle C, Chapters 7 and 9 of the Zoning Regulations. This filing also included a robust survey history showing the dimensions from the building façade to the property line (Exhibits #19, 20, and 22).

July 2: DCRA updates ANC on status of the permit stating: "At this time the representatives of the Doordash have informed us that they will be submitting a revision to permit #B2103902 to revise the parking layout to show the **required zoning compliant parking** in the front of the building. This revision **will include a surveyor's plat** showing the layout, size of the spaces and the property line." (Emphasis Added, Tab D)

July 6: Property Owner files First Revised Permit with falsified dimensions on the property's site plan (Tab E) and Cover Page (Tab F). The site plan included with the First Revised Permit states that the front of the building is 26 feet from the property line, and that the site would have one parking space with a depth of 18 feet, as well as three parking spaces with depths of 17 feet. However, previous surveys of the lot (Exhibit #19 and 20) and the adjacent lots (Exhibit #22) all show that the front of the building is between 24 feet and 24 feet-7 inches from the property line.

August 9: DCRA Approves the permit drawings and First Revised Permit Issued. The First Revised Permit did not include a plat. The Zoning Administrator makes new determinations

*"EXISTING CONDITIONS: 1 EXISTING, NONCONFORMING LOADING BERTH MEASURING 12' x 26' AND ONE LOADING PLATFORM MEASURING 10' x 10'"

*"2 REQUIRED PARKING SPACES (1 REQUIRED @ 9' X 18 AND 1 ALLOWED @ 8' 16' PER SUB C. SEC. 712.3"

*"EXISTING CONDITIONS: 4 EXISTING PARKING SPACES (1 @ 9' x 18' and 3 @ 9' x 17')"

August 11: ANC 6B notifies ZA of material misrepresentations in the First Revised Permit as well as a failure to provide a plat.

August 23: DCRA issues Unrevised First CoFO despite the issues raised by ANC 6B related to material misrepresentations in the First Revised Permit as well as lacking a plat. However, Lessee does not begin operations. The Unrevised First CoFO when issued was for "STORAGE WAREHOUSE – DOOR DASH" (Tab B)

August 27: DCRA send weekly email to ANC 6B (Tab G) noting CoFO was issued for "STORAGE WAREHOUSE – DOOR DASH"

September 14: ZA notifies ANC 6B it has issued Notices to Revoke the Original Permit, Revised Permit, and First CoFO but notes that he is allowing Property Owner to satisfy undisclosed conditions to reverse this notice (Tab H). ZA further notifies ANC 6B that the Property Owner has responded to the notice with new information and an application to revise the series of permits. The revision to the First Revised Permit was accepted as complete from DCRA the same day according to DCRA's Scout System.

September 16: DCRA issues permit B2112156 ("Second Revised Permit") as a revision to the First Revised Permit. This updated appeal does not address the determinations therein

September 23: Nine days after the application for the Second Revised Permit was accepted as complete and only after alerting DCRA that ANC 6B was moving to expand the appeal (Tab I), DCRA finally provides related documents to Second Revised Permit to ANC 6B at 7:57 PM (Tab J). These documents contain the Altered First CoFO approving retail use.

Property History

The property is improved with a 5,000 square foot warehouse with a 790 square foot habitable mezzanine. The building was originally constructed in 1960, after the adoption of the first Zoning Regulations in the District of Columbia and was conforming to the regulations regarding parking and loading requirements. The property was zoned C-M-1 and maintained that zoning until the adoption of the 2016 Zoning Regulations when it was renamed to PDR-1. The building is set back 24 feet from the front property line, allowing for parking in the front yard as allowed in the C-M-1/PDR-1 zone. When constructed, the building provided a zoning-compliant loading berth including loading platform on the eastern edge of the building (See Exhibit #19 showing the loading platform on the eastern edge of the building). At some point before 2011, the loading platform was filled in. The loading platform was converted to a landing to access an entry door on the front of the building. Between 2012 and 2015, a ramp was added to this landing which brought the total projection approximately 10 feet from the building façade, reducing the front yard depth to 14 feet where the ramp and landing exist. Previously, the building was surrounded by parking lots and warehouse buildings. However, in 2020, a residential structure was built that now abuts the west side of the building and is set back only seven feet from the rear of the building (Exhibit #22).

The use of this building was consistently various forms of production, distribution, and repair from 1960 until 2013. In 2013, the building changed use to retail, as a temporary home for Frager's Hardware as it rebuilt following a catastrophic fire at its location on Pennsylvania Ave SE. The retail use ceased, and the building has been vacant since approximately August 2019. The Original Permit states that the building will be used "as a storage and distribution center of goods that will be delivered by paid drivers to consumers." (Exhibit #10).

Errors Made by Zoning Administrator and Analysis of Timeliness

Loading

1) The First Revised Permit contains a new determination that the project is providing a loading berth and that loading berth is "existing, nonconforming loading berth measuring 12' x 26' and one loading platform measuring 10' x 10'" (Tab E). Quite simply, there is no ability in the zoning regulations for a nonconformity via loading for a use and structure built under ZR58 to be "lawfully in existence" as

required by B-100.2² and C-201.2³. This novel determination, as far as ANC 6B can tell, does not have existing case law.

Timeliness: The determination of an allowable nonconforming loading berth appears first in the First Revised Permit thus this allegation is timely.

2) Even if the BZA were to decide that the creation of a lawfully existing non-conformity is something appropriate for the ZA to determine, all loading nonconformities for the alleged existing nonconforming use expired on or about November 11, 2016, three years after the Certificate of Occupancy was issued for the prior retail use according to C-204.6⁴. Retail was a change of use, and that use was permitted for 4,000 square feet of occupied space (Exhibit #17) and was therefore not required to provide loading. C-901.1 and Zoning Regulations of 1958 Section 2201.1 require no loading berths for retail uses with less than 5000 sq. ft. of occupied floor space in PDR-1/M zones.

Timeliness: The determination of an allowable nonconforming loading berth appears first in the First Revised Permit thus this allegation is timely.

3) Even if the BZA were to determine that the ZA's creation of post-ZR58 lawfully existing nonconformities is valid, the First Revised Permit carries forward the determination from the Original Permit that the existing loading meets all dimensional and loading requirements *except for the two-dimensional size (12' x 26')* while also noting a 10'x10' loading platform is being provided. There are multiple errors by the ZA in this determination. In the Original Statement, ANC 6B alleged errors detailing the failures to comply broadly with the provisions of C-907. The ZA's changing determination in the First Revised Permit makes moot some of the allegations in the Original Statement. However, ANC 6B continues to allege specific errors in layout and size requirements. Specifically, the proposed loading berth does not meet the requirements of C-905.2⁵ as the loading berth door is neither 12 feet wide nor 14 feet tall. Further, the location of the loading berth does not comply with C-904.5, which requires the loading berth to be off the alley since it's connected to a series of improved alleys over 15 feet. All of these requirements have been in the Zoning Regulations since 1958. The First Revised Permit conveniently does not provide measurements of height or width of the loading berth door. But the failures can be seen in the First Revised Permit's Site Plan (Tab E) which make clear the width of the loading berth door is approximately the size of the loading platform, which is 10 feet wide. Multiple

² **Nonconforming Use:** Any use of land or of a structure, or of a structure and land in combination, lawfully in existence at the time this title or any amendment to this title became effective that does not conform to the use provisions for the zone in which the use is located. A use lawfully in existence at the time of adoption or amendment of this title that would thereafter require special exception approval from the Board of Zoning Adjustment shall not be deemed a nonconforming use. That nonconforming use shall be considered a conforming use, subject to the further provisions of Subtitle X.

³ Any nonconforming use of a structure or of land, or any nonconforming structure lawfully existing on the effective date of this title that remains nonconforming, and any use or structure lawfully existing that became nonconforming on the effective date of this title, may be continued, operated, occupied, or maintained, subject to the provisions of this chapter.

⁴ A nonconforming use that is discontinued for any reason for a period of three (3) years or less shall be allowed to resume operation provided there was no intervening conforming use, there are no changes to the nonconforming use, and it conforms with Subtitle C § 204.1.

⁵ All loading berths shall be a minimum of twelve feet (12 ft.) wide, have a minimum depth of thirty feet (30 ft.) and have a minimum vertical clearance of fourteen feet (14 ft.).

photos in Exhibit 25, especially Page 6, show the loading berth door is approximately the height of a work van, well below the required 14 feet. Again, these dimensions were not provided by the Property Owner or Lessee in the Original of First Revised Permit.

Timeliness: The determinations have not changed from the Original Permit to the First Revised Permit. The errors were alleged in the timely filed Original Statement and thus this allegation is timely.

4) The ZA has determined that a loading platform of 10'x10' is being provided. The claimed loading platform, which slopes downward about three feet, does not meet the requirement to be horizontal⁶ in C-905.4(d)⁷. This slope is noted in Tab E.

Timeliness: The determination that a loading platform is being provided first appeared in the First Revised Permit and thus this allegation is timely.

5) The ZA has determined that the loading berth size is 12 feet wide by 26 feet in length. However, the ZA has failed to require the applicant provide a plat per A-301.2(b)⁸. The dimensions provided by the Applicant in the First Revised Permit's Site Plan (Tab D) include misrepresentations about the distance between the front façade and property line. The site plan included with the First Revised Permit states that the front of the building is 26 feet from the property line. However, previous surveys of the lot (Exhibit #19 and 20) and the adjacent lots (Exhibit #22), and recent measurements done by ANC 6B, all show that the front of the building is between 24 feet and 24 feet-7 inches from the property line, suggesting that the loading berth has a depth of only between 24 feet and 24 feet-7 inches.

Timeliness: The failure to provide a plat existed in the First Permit but there was also no site plan provided. The failure to require a plat only became an error by the ZA once the site plan in the First Revised Permit was included. Thus this allegation is timely.

Parking⁹

6) The ZA's new determination in the First Revised Permit is that the parking spaces in front of the property comply with the requirement of one 9' x 18' spot and one 8' x 16' spot, while determining that a total of four (4) total parking spaces are being provided. The ZA erred in issuing the First Revised Permit without requiring a plat per A-301.2(b). The dimensions in the site plan provided by the Applicant in the First Revised Permit contain the egregious material misrepresentation that there is 26 feet

⁶ "Horizontal" is not defined in B-100.2, however the Zoning Regs in at least one place mention "horizontal or near-horizontal" related to vegetated roofs in B-100.2. This reference makes clear that horizontal means parallel or flat. Merriam Webster defines as "parallel to, in the plane of, or operating in a plane parallel to the horizon or to a baseline"

⁷ A loading platform floor shall consist of one (1) horizontal level.

⁸ An official building plat, in duplicate, prepared by the Surveyor of the District of Columbia, upon which the applicant shall indicate in ink and to the same scale dimensions:

- (1) All existing and proposed structures;
- (2) The number, size, and shape of all open parking spaces, open loading berths, and approaches to all parking and loading facilities; and
- (3) Other information necessary to determine compliance with the provisions of this title.

⁹ As stated in the summary, ANC 6B is aware that DCRA has issued the Second Revised Permit and is currently analyzing the determinations made by the ZA in this permit.

between the property line and building's front façade. The dimensions provided by the Applicant show that the one required full size parking space, one required compact parking space, and two non-required compact parking spots complying with C-712.5 and C-712.6. However, extensive survey history (Exhibit #19, 20, and 22) and on-site measurements, show that the front facade is between 24 feet and 24 feet-7 inches from the front property line, which means the parking spaces do not meet the minimum dimensions required by C-712.5 and C-712.6 because they would have depths of only 16 feet and 15 feet respectively.

Timeliness: This allegation of a failure to provide parking that meets the size requirements carries over from the Original Statement and thus this allegation is timely.

CofO

7) The Unrevised First CofO (Tab B) was altered by DCRA after issuance and contains a factual impossibility and should be revoked in addition to altering the approved use. On August 20, the ZA approved CO2102980 for use as "STORAGE WAREHOUSE—DOOR DASH". Despite requests, DCRA has not provided ANC 6B with the application for this Certificate of Occupancy.¹⁰ When DCRA filed exhibit 42, they included the Altered First CofO (Tab C). The Altered First CofO, with an issuance date of August 23, 2021, is claimed to be based on "ASSOCIATED PERMITS B2103902, B2109853, B2112156". However, B2112156, an Alteration and Repair Permit, was not even filed with the DCRA until September 10, 2021 (Tab J). It should be impossible for DCRA to issue a Certificate of Occupancy based on a permit that doesn't exist. C-302.4 makes clear "If a building permit application for the erection or alteration of a structure is submitted, a certificate of occupancy for that structure shall not be issued until the erection or alteration is completed to the point of availability of occupancy for use, except as provided in Subtitle A § 302.5". An alteration permit not even issued, let alone completed, cannot be the basis for issuing a CofO.

Timeliness: First Writing of this Decision is unknown, but ANC contends it would be when DCRA filed Exhibit 42 on September 23 as the Altered First CofO was not available through any normal means until it was provided. Nonetheless, if DCRA contends first writing was when the Unrevised First Permit was issued, this allegation is timely.

Use Misclassification

8) Up until the issuance of the Altered First CofO, the project was continuously classified as a storage/warehouse establishment. On March 19, 2021, in the response to comments from the ZA (Exhibit 7), the ZA indicated the proposed use was "distribution and office" and the Lessee did not disagree with that proposed use. On June 14 when the First Revised Permit was filed, the project was described as a "[S]torage facility for convenience store items that will be distributed by DoorDash." When the Unrevised First CofO was issued, it was captioned as "Storage Warehouse—DoorDash". While this history of determinations by the ZA and representations by the Lessee are not conclusive as to misclassification of use, when combined with the regulations it is impossible to conclude otherwise.

The ZA erred specifically in not classifying this use as Production Distribution and Repair as defined in B-200.2(z)¹¹ which specifically includes "warehouse", "storage", "distribution", and "goods intended to

¹⁰ ANC 6B has a pending FOIA request for this information with an estimate completion date of October 5, 2021

¹¹

wholesale". The ZA's determination that this is a retail establishment is undone by the use definition of "retail" in B-200.2(bb). Going line by line:

(1) A use engaging primarily in the on-site sale of goods, wares, or merchandise directly to the consumer or persons without a resale license;

The proposed DoorDash DashMart has advertised itself through the sale of goods through its app and delivery to consumers via third-party businesses (usually independent contractors). These independent contractors do not decide what they want to buy and deliver, instead they are told by their customers what to acquire and deliver.

(2) These uses include goods commonly sold to individuals in small quantities for their direct use;

The proposed DoorDash DashMart has promoted itself not for sales to customers but rather to other businesses who would then deliver goods.

(3) Examples include, but are not limited to: shop, appliance, computer, drug, jewelry, fabric, department, large format, or grocery stores; clothing or gift boutiques; or pawn and antique shops; and

(4) Exceptions: This use category does not include wholesale goods commonly sold to businesses in bulk, corner store use, or uses which more typically would fall within the arts, design, and creation; eating and drinking establishments; automobile-related; firearm sales; marine; production, distribution, and repair; or sexually-oriented business use categories;

The proposed dash mart is not mainly engaged in the business of selling to individuals, they are in the business of wholesaling goods to independent delivery businesses

The ZA has not provided his analysis under B201.5 nor has information been presented in public documents to the ZA stating how the use is properly classified as retail.

Timeliness: ANC 6B contends the First Writing of this determination is September 23, when DCRA served the ANC Exhibit 42. There is a documented history of the original CoFo being issued for Storage and Warehouse until Exhibit 42 was filed.

Timeliness

Production, Distribution, and Repair:

(1) A use involving the on-site production, distribution, repair, assembly, processing, or sale of materials, products, technology, or goods intended for a wholesale, manufacturing, or industrial application;

(2) Uses may include firms that provide centralized services or logistics for retail uses, and wholesale goods establishments commonly selling to businesses in bulk. These uses typically have little contact with the public;

(3) Examples include, but are not limited to: manufacturing facility, concrete plant, asphalt plant, material salvage, hauling or terminal yard, chemical storage or distribution, outdoor material storage, acetylene gas manufacturing, fertilizer manufacturing, rock quarrying, warehouse, storage, self-storage establishment, ground shipping facility, or wholesale sales; and;

(4) Exceptions: This use category does not include uses which more typically would fall within the retail, service, or waste-related services use categories;

This Original Permit was issued on May 5, 2021. ANC 6B passed a resolution on June 8, 2021 to file this appeal allowing for the authorized representative to amend the appeal when revised permits or a certificate of occupancy was issued. ANC 6B filed the Original Statement on June 30, within 60 days of the issuance of the Original Permit. The First Revised Permit was issued on August 9, 2021. The original CofO was issued on August 23. ANC 6B is filing this First Revised Statement and associated motion to amend the appeal to include the First Revised Permit and Unrevised First CofO on September 24, well within the 60 days of the first writing of the determinations in the First Revised Permit and Unrevised First CofO. ANC 6B contends and can prove that first writing of the determinations contained in the Altered First CofO was September 23. This the allegations of errors in the Altered First CofO are timely.

How ANC 6B Will Prove Their Case

Appellants will prove the errors made by the zoning administrator through the following methods:

- 1) Analysis of the Zoning Regulations
- 2) Testimony and photographic evidence on past use and alterations to the property
- 3) Expert testimony on the requirements for parking and loading and provisions relates to existing non-conformities
- 4) Current Building Permit Plans
- 5) Historic Certificates of Occupancy and Certificate of Occupancy Applications
- 6) Historic Building Permits, Building Plans, and Building Permit Applications
- 7) Documents from the Surveyor's Office (Subdivisions, Wall checks, A&T lot creation)
- 8) Communications between ANC 6B and the Zoning Administrator's Office

Nearly all the related documents have been attached to the Original Statement or this First Revised Statement. ANC 6B requested one historic Permit from DCRA in June of 2021. As of filing this amended statement, ANC 6B still has not received this permit from DCRA and will submit it to the record and serve all parties as soon as it does.

ANC 6B reiterates its long-standing public position that this use here simply isn't allowable by right because the zoning-compliant parking spots and loading berth were illegally removed at this property and are no longer able to be provided. The zoning regulations are clear, only the BZA may grant relief to the dimensions of parking spots and those spots may not be less than the compact parking spot size (C-712.11). We stand by ready to work with the Lessee, the Property Owner, and the District Department of Transportation as a party in a Special Exception application waiving these parking and loading requirements to create a viable use for the Property Owner and Lessee with appropriate impact mitigations.